No. 18399

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT A. PALOMINO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

FRANCIS C. WHELAN,
United States Attorney,

THOMAS R. SHERIDAN,
Assistant U. S. Attorney,
Chief, Criminal Section,

DAVID R. NISSEN,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 18399

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT A. PALOMINO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTION and STATEMENT OF THE CASE.

The Federal Grand Jury for the Southern District of California returned Indictment No. 26848 on June 11, 1958, charging appellant with violating Title 21, United States Code, Section 174. Thereafter, defendant pleaded guilty to Count One and on June 13, 1961, was sentenced to fifteen years by the Honorable Harry C. Westover, United States District Judge. The remaining four counts were dismissed on motion of the Government.

Also on June 13, 1961, upon a plea of guilty to a charge of bail jumping in Indictment No. 29419, appellant was sentenced to five years in prison, the sen-

tence to run consecutively to that imposed in case No. 26878.

On April 5, 1962, appellant filed petition No. 62-507-HW moving for vacation of the sentence in No. 26848 under Title 28, United States Code, Section 2255. Appellant's motion was denied by Judge Westover on June 4, 1962, and on July 3, 1962 appellant gave notice of appeal.

The District Court had jurisdiction to entertain the motion pursuant to Title 28, United States Code, Section 2255. This court has jurisdiction to entertain this appeal pursuant to the provisions of Title 28, United States Code, Sections 2253, 1291 and 1294.

II.
STATUTES INVOLVED.

Title 21, United States Code, Section 174, provides in pertinent part:

> "Whoever frauduently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . . .
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have

had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 28, United States Code, Section 2255, provides in pertinent part:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

III.
QUESTIONS PRESENTED.

The two questions presented by this appeal are: 1) whether appellant can raise any issue under Section 2255 since he is not claiming the right to be released, and if he can 2) whether the Indictment is void for want of essential allegations.

IV.
SUMMARY OF ARGUMENT.

I.

Since Appellant Does Not Claim the Right to Be Released, He Cannot Raise Any Issue by Motion Under Section 2255.

II.

The Allegations of the Indictment Are Sufficient.

A. Unlawful Importation of Heroin, and Appellant's Knowledge Thereof, Need Not Be Alleged in a Conspiracy Count.

B. The Indictment Need Not Allege That Appellant "Knowingly and Fraudulently" Conspired.

V.

ARGUMENT.

I.

Since Appellant Does Not Claim the Right to Be Released, He Cannot Raise Any Issue By Motion Under Section 2255.

Section 2255 of Title 28, United States Code, respecting vacation of sentence is effective only if the granting of the relief requested will act to release the petitioner from custody, and where there are consecutive sentences imposed, a federal prisoner is not entitled to maintain a motion to attack one, when, even if the attack were successful, he would still be in custody under the other sentence.

May v. United States, 261 F. 2d 629 (9 Cir. 1958);

Toliver v. United States, 249 F. 2d 804 (9 Cir. 1957);

Hoffman v. United States, 244 F. 2d 378 (9 Cir. 1957).

In the present case, fifteen- and five-year consecutive sentences were imposed on appellant on June 13, 1961. Even if appellant were successful in his attack upon the fifteen-year sentence, he would still be incarcerated under the five-year sentence. For this reason he cannot use a Section 2255 motion to attack the first sentence.

However, even if appellant were allowed to attack the Indictment in Case No. 26848, he would not be entitled to any relief since the allegations of that Indictment are sufficient.

II.

The Allegations of the Indictment Are Sufficient.

This and other Courts of Appeal adhere to the well-recognized principle that an Indictment is not open to collateral attack after conviction unless it is so fatally defective as to deprive the court of jurisdiction, and if its sufficiency is not questioned at trial, it will not be held insufficient on a motion to vacate the judgment entered thereon unless it is so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had. *Fiano v. United States,* 291 F. 2d 113 (9 Cir. 1961); *Pifer v. United States,* 158 F. 2d 867, 868 (4 Cir. 1946), cert. denied 329 U. S. 815 (1947); *Lucas v. United States,* 158 F. 2d 865 (4 Cir. 1946), cert. denied 67 S. Ct. 977 (1947); *Muench v. United States,* 96 F. 2d 332, 334-335 (8 Cir. 1938).

It has also been held that while conviction does not foreclose a defendant from raising an objection that an information fails to state an offense, the fact that he delays in raising such an objection until it is too late to cure the defect by simple amendment is a factor which may be considered in judging the information's sufficiency. *Finn v. United States,* 256 F. 2d 304 (4 Cir. 1958). By the same reasoning, appellant's undue delay in objecting to the indictment is a factor which should be considered in judging its sufficiency.

Under the applicable law discussed above, the only question before the court is whether any alleged insufficiency of Count One is so serious as to render the indictment fatally defective. The case of *United States v. Debrow,* 346 U. S. 374 (1953), held that under the requirements of the Federal Rules of Criminal Procedure, an indictment is sufficient if it contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet so as to enable him to prepare his defense and to plead the judgment therein in bar of any further prosecution for the same offense.

So far as the indictment's informing appellant of the charge against him and being specific enough to permit him to plead the prior judgment in bar of subsequent prosecution, there can be little doubt of its sufficiency. In fact, appellant has not claimed that he was prejudiced by any defect in the indictment in this regard; instead, he predicates his entire objection to the indictment on the ground that Count One does not contain essential allegations.

Appellant contends that Count One is fatally defective because it fails to allege:

A. Unlawful importation of heroin and appellant's knowledge thereof; and

B. That appellant "knowingly and fraudulently" conspired.

A. Unlawful Importation of Heroin, and Appellant's Knowledge Thereof, Need Not Be Alleged in a Conspiracy Count.

It should be noted at the outset that *conspiracy* to commit a crime is a distinct offense, different from the crime which is the object of the conspiracy, and this is true even though the substantive crime and the conspiracy are made offenses by the same statute. *American Tobacco Co. v. United States,* 328 U. S. 781 (1946). By no stretch of logic can it be said that a conspiracy to violate Title 21, United States Code, Section 174, is merely substantive violation of Section 174 rather than a separate and distinct offense of conspiracy. *United States v. Galgano,* 281 F. 2d 908 (2d Cir. 1960).

The sufficiency of an indictment after conviction is liberally construed, and it is enough if the necessary allegations "appear in any form, or by fair construction can be found within the terms of the indictment." *Hagner v. United States,* 285 U. S. 427, 433 (1932). The element of illegal importation and appellant's knowledge thereof is necessarily implied from the provisions of Section 173 and 174 of Title 21, which prohibit the importation of heroin or opium into the United States and permit an inference of illegal importation and knowledge thereof to be drawn from mere possession of a narcotic drug.

Furthermore, this court has repeatedly held that it is not necessary to allege in a conspiracy charge all

the elements of the substantive offense which is the object of the conspiracy, and that in charges of conspiracy to violate Title 21, United States Code, Section 174, the indictment need not allege that the narcotic was unlawfully imported and that the defendant knew it. *Stein v. United States,* .....F. 2d ..... (9 Cir. 1962); *Medrano v. United States,* 285 F. 2d 23 (9 Cir. 1960). In the *Stein* case, this court rejected virtually the same argument which appellant now makes.

B. The Indictment Need Not Allege That Appellant "Knowingly and Fraudulently" Conspired.

Section 174 of Title 21, United States Code, applies the terms "fraudulently or knowingly" to certain acts done with respect to narcotic drugs, such as importing, receiving, concealing, buying, or selling such drugs. The obvious reason for the use of such terms is to insure that no one would be convicted for acts done innocently through inadvertance or by mistake. *Morissette v. United States,* 342 U. S. 246, 250, 252, 264 (1952).

Section 174 applies to anyone who "conspires to commit any of such acts" without specifying that the conspiracy must be fraudulent or knowing. The reason for this is simply that a conspiracy is a combination of two or more persons to accomplish a criminal purpose, or some non-criminal purpose by unlawful means. *Ong Way Jong v. United States,* 245 F.

2d 392, 394 (9 Cir. 1957); *Yates v. United States,* 225 F. 2d 146, 155 (9 Cir. 1955). The gist of the crime of "conspiracy" to violate a federal law is the confederation of *minds* of the conspirators. *Marino v. United States,* 91 F. 2d 691 (9 Cir. 1937). In short, without a fraudulent or knowing state of mind, there could be no conspiracy. As was said in *Razete v. United States,* 199 F. 2d 44 (6 Cir. 1952), cert. denied 344 U. S. 904 (1952), conspiracy is bottomed on unlawful and wilful intention, and an allegation of conspiracy involves deliberate plotting to subvert the laws. Unlawful and knowing intention to violate the law is clearly enough alleged by the statement that the accused conspired to do so. *Burroughs and Cannon v. United States,* 290 U. S. 534, 544 (1934).

It is clear that the fraudulent and knowing character of appellant's confederation is necessarily implied from the very charge of conspiracy, and under the rule of liberal construction of indictments subsequent to conviction, as set out in *Hagner v. United States,* 285 U. S. 427, 433 (1932), the indictment here is not void for want of such an allegation.

In addition, under the previously mentioned rule of *Wong Tai v. United States,* 273 U. S. 77, 81 (1927), a conspiracy indictment need not allege all elements of the offense which is its object. Contrary to appellant's assertion, the indictment in *Stein v. United States, supra,* which this court found sufficient, did

not state that the defendant therein conspired fraudulently or knowingly, but merely that the defendant conspired to violate Section 174 by doing certain acts "knowingly" and "unlawfully".

V.
CONCLUSION.

For the reasons stated above the order of the District Court denying the motion to vacate judgment of conviction should be affirmed.

Respectfully submitted,

FRANCIS C. WHELAN,
United States Attorney,

THOMAS R. SHERIDAN,
Assistant U. S. Attorney,
Chief, Criminal Section,

DAVID R. NISSEN,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID R. NISSEN